IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT

JAIPUR BENCH, JAIPUR

Prem Chand & Ors. Vs. Motichand & Ors.

S.B. CIVIL FIRST APPEAL No.82/1981 UNDER SECTIOIN 96 OF THE CIVIL PROCEDURE CODE AGAINST THE JUDGMENT AND DECREE DATED 22.12.1980 PASSED BY THE ADDITIONAL DISTRICT JUDGE, NO.7, JAIPUR CITY IN A SUIT FOR PARTITION OF PROPERTY.

Date of Judgment :: 31st August, 2007

REPORTABLE

Hon'ble Dr. Vineet Kothari, J.

Mr.R.K. Agarwal for the appellants.
Mr.Ajeet Bhandari for the respondents.

1. This appeal under Section 96 of the C.P.C. is directed against the judgment and decree of learned Additional District Judge, No.7, Jaipur City dated 22.12.1980. The present appeal has been filed by the defendant Prem Chand son of Shri Gulab Chand, the judgment-debtor, now represented through his legal representatives.

2. The facts in brief giving rise to this appeal are that the decree-holder-plaintiff Khajulal, now represented through his legal representatives Shri Motichand and others filed a suit for partition and possession of the half portion of a residential house known as “Haveli”

situated at Chokadi Ramchandraji in Jaipur. The said Haveli was a joint Hindu Undivided Family property of Gulab Chand and one Maliram having half share each. In a decree passed in favour of one Ganga Pratap against defendant Gulab Chand in execution case No.654/42, the said half share of Gulab Chand of the Haveli was attached and auctioned, which was purchased by plaintiff Khajulal in a court auction on 6.1.1942 for a sum of Rs.1,005/- and the sale certificate in this regard was also issued by the Executing Court on 30.11.1942. The said decree-holder Khajulal filed an application for possession of the said one-half portion of Gulab Chand in the Haveli and the symbolic possession of the same was given to him on 17.11.1943 by the Bailiff of the Court with the following report, which is reproduced hereunder in Hindi and Urdu language as it is and the bracketed English translation as informed by learned counsel by referring to the dictionary.

"जनबा अली

मैं मय गोविन्दसिंह चपरासी दिनांक 17.11.43 बवक्त 12.30 बजे दिन मकान गुलाबचंद हमरा नुश्तरी मौके पर पहुंचा। गुलाबचंद मौजूद मिला। उसको हुक्म से मुतला किया गया तो बयान किया कि कब्जा देने में मुझको कोई उजर (inform) नहीं है। जायदाद सौसीरी (joint) है। आधी का कब्जा ले ले।

ह0 गुलाबचन्द

लिहाजा जरिये ढोल एलान कब्जा निस्फ (half) मकान का किया गया और डिगरीदार को जरिये एलान कब्जा दिला दिया गया और किरायानामा तहरीर कराकर कब्जा कराया गया।

जरिये ढोल किरायानामा मौरिखा (written or dated) इमरोजा (today) बर कागज सादा कब्जा निस्फ मकान का ले लिया।

ह0खाजूलाल"

3. That on 10.9.1973 after the death of Khajulal, his successors Motichand and others filed the present suit for partition and possession of the one half share in the said Haveli belonging to the judgment-debtor Gulab Chand claiming the following reliefs in the suit, which is also reproduced in Hindi as given in the plaint, as under:-

"(क) दावा वादीगण खिलाफ प्रतिवादी डिग्री फरमाया जाकर कुल हवेली मुन्दर्जा मद नं.1 के दो हिस्से बराबर के किये जाकर वादीगण के हिस्से में जो जायदाद बाई मीट्स एन्ड बाउण्ड आवे उस पर दखल जुदागाना वादीगण को दिलाया जावे और चौक, पोल, नाल, तहारत मुश्तका रखा जावे।

(ख) दावा वादीगण खिलाफ प्रतिवादी बकदर मु.180 रुपया जरे

किराया व हर्जा व बाबत इन्खता डिग्री फरमाया जाकर जायदाद मुन्दर्जा किरायानामा 24.9.58 पर बबेरखती प्रतिवादी वादीगण का कब्जा कराया जावे।

(ग) योम दायरी दावा ता इन्खला जरे हर्जा बाबत इस्तेमाल मकानात या जरे वासलात बशहर 5 रुप्या मासिक पर रसूम ली जाकर वसूल कराया जावे।

(घ) खर्चा मुकदमा दिलाया जावे।

(ड.) दीगर दादरसी जो करीने इन्साफ हो वोह दिलाई जावे"।

4. Learned trial Court framed as many as 13 issues in the trial of the suit, which are reproduced from the impugned judgment, as under:-

"1. Whether half of the house detailed in para No.1 of the plaint which belonged to defendant's father Gulab Chand was put to auction in execution case No.654/42 and was purchased by the plaintiff's ancestor Khajulal in Court auction sale?

2. Whether Gulab Chand after the said auction sale attorned as a tenant to said Khajulal and then to his sons by executing rent notes (including one of 24.9.58) and paying rent at the rate of Rs.5/6 per month to them.

3. Whether there exists a relationships of landlord and tenant between the parties to the suit?

4. Whether an amount of Rs.872/- as rent and of Rs.902/- as damages for use and occupation is due to the plaintiff from the defendant?

5. Whether the defendant is a defaulter within the meaning of Section 13(1)(a) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 and liable to be evicted as such from the plaintiff's share of the suit house?

6. Whether the tenancy of defendant regarding the suit house has been determined by a valid notice to quit?

7. Whether the plaintiffs as successors of Khajulal are entitled to the partition and possession in respect of their half share in the suit house?

8. Whether the suit for partition and eviction cannot be tried together?

9. Whether the suit is barred by limitation?

10. Whether the plaintiffs had not been in possession of the suit house within a period of 12 years from the date of institution of the suit ? If so, to what effect?

11. In case issue No.1 comes to be decided in favour of the plaintiffs, whether the defendant and his ancestors are in adverse possession of Khajulal's share of house and had acquired ownership therein by prescription?

12. Whether the suit is undervalued and the court fee deficient.

13. Relief?”

5. While the issue relating to the partition was decided in favour of the plaintiffs holding that plaintiffs Motichand and others successors of Khajulal, the decree-holder, were entitled to one-half share in the said property belonging to the judgment-debtor, Gulab Chand and issue No.2 relating to tenancy was also decided partly in

favour of the plaintiffs holding that the said Gulab Chand had attorned as a tenant to the said Khajulal and after his death, his sons have also executed a separate rent note on 24.9.1958 in favour of the successors of Khajulal vide Ex.5, yet related issue No.3 as to whether there exists relationship of landlord and tenant between the parties of the suit, was decided against the plaintiffs. The learned Trial Court while deciding issue No.3 held that though a rent note was executed in favour of Khajulal on 17.11.1943 (Ex.4) and thereafter, on 24.9.1958 (Ex.5), since auctioned portion of Haveli was not partitioned and the defendants never paid any rent to the plaintiffs, the relationship of landlord and the tenant did not stand established and defendant Gulab Chand was in permissible possession as co-sharer in the said half portion of the Haveli. The issue of limitation, namely, issue No.9 was decided in favour of the plaintiff and the suit was held to be within limitation by a detailed discussion of the law by the learned trial Court.

6. That as far as issue No.3 having been decided against the plaintiff, the plaintiff has not filed any cross-appeal or has not even filed any cross-objection in the present appeal filed by the defendant before this Court.

In the present appeal filed by the defendant, the only point

pressed by learned counsel for the defendants-appellants, Mr. R.K. Agarwal, is that of the limitation. No other point was pressed before this Court.

7. That thus, the question of law, which is required to be decided on the basis of facts found by the learned trial Court is as to whether the suit filed by the plaintiff on 10.7.1973 seeking partition of the said joint Hindu family property, the aforesaid Haveli and also possession of the one-half share of the judgment-debtor Gulab Chand was barred by limitation or not.

8. I have heard both the learned counsels for the parties at length and perused the record of the case and have gone through the impugned judgment as well as judgments cited at the bar.

9. The basic contention of learned counsel for the appellants-defendants, Mr. R.K. Agarwal, is that the present suit is governed by the old Limitation Act, 1908 as the sale in favour of the plaintiff, decree-holder, Khajulal was made by the Court in execution proceedings on 6.4.1942, which sale, was confirmed by the Court on 13.11.1942 by issuing the sale certificate in favour of the decree-holder, Khajulal. The new Limitation Act, 1963 came into force on

1.1.1964. He submitted that as per Article 138 of the Limitation Act, 1908, the period of limitation was only 12 years from the date when the sale becomes absolute, which according to him, in the present case expired on 30.11.1954, 12 years counted from the date 30.11.1942 when the sale certificate was issued in favour of plaintiff Khajulal in respect of undivided half share of Haveli. Referring to various Articles of the Limitation Act, 1908, he urged that since plaintiff Khajulal was a purchaser, in a Court sale in execution of decree when the judgment-debtor Gulab Chand was in possession on the date of sale, the period of limitation of 12 years started to run from the date when the sale becomes absolute vide column 3 of the said schedule of Articles of the Limitation Act, 1908 and thus, the suit filed on 10.9.1973, which was much after the lapse of 12 years on 30.11.1954, the present suit was barred by limitation and, therefore, issue No.9 was wrongly decided in favour of the plaintiff and the present appeal deserves to be allowed holding the suit to be time barred. It would be relevant to reproduce the various relevant clauses of Limitation Act, 1908, which were referred to by learned counsel for the appellant-defendants, as under:-

Extract from Limitation Act, 1908 :

Art.	**Description of Suit**	**Period of Limitation**	**Time from which period begins and runs**
136	By a purchaser at private sale for possession of immovable property sold when the vendor was out of possession at the date of the sale.	Twelve Years	When the vendor is first entitled to possession.

138	Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of sale	Twelve Years	The date when the sale becomes absolute.
140	By a remainderman, a reversioner (other than landlord) or a devisee, for possession of immovable property.	Twelve Years	When his estate falls into possession.
141	Like suit by a Hindu or Muhammadan entitled to the possession of immovable property on the death of a Hindu or Muhammadan female.	Twelve Years	When the female dies.
144	For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve Years	When the possession of the becomes adverse to the plaintiff.

10. Learned counsel for the appellant-defendants also drew the attention of the Court towards Section 9 of the Limitation Act, 1963, which stipulates that where once time has began to run, no subsequent disability or inability to institute a suit or make an application stop it. Further by referring to Section 31 of the Limitation Act, 1963, learned counsel urged that if the period of limitation as prescribed under the old Limitation Act, 1908 had expired before coming into force the new Limitation Act, 1963, then the provisions of new Limitation Act shall not apply. According to him, since the limitation had expired on 30.11.1954, after lapse of 12 years, new Limitation Act would not apply in the present case.

therefore, the period of 12 years can at the most be counted from the said date i.e. 17.11.1943, if not from 30.11.1942 when the sale certificate was issued in favour of the said Khajulal and even then the present suit would be barred by the limitation. He submitted that though the purchaser of a coparcener's undivided interest in the joint family property is entitled to claim partition of the said property, but since in the present suit, the plaintiff had also claimed possession of the said property, the suit had to be brought within the period of 12 years from the date when the sale became absolute i.e. 30.11.1942. In the judgment relied upon by learned counsel, the Hon'ble Supreme Court held that in such a case Article 144 of the Limitation Act, 1908 will apply and though the order of symbolic possession made in favour of the transferee, purchaser of the undivided share in the coparcener's property was wrong in law, but it would not be said to be an order, which is without jurisdiction or a nullity and unless such order is set aside, it would have full effect and, therefore, since by delivery of symbolic possession under the order of November 6, 1939, the adverse possession of the defendants was interrupted. The period of limitation has to commence to run from the date and so considered, the suit having been brought within twelve years of that date, it was held to be not barred by limitation. It would be appropriate to reproduce Para 5 of the said judgment, as under:-

"5. As earlier stated the High Court held that Art. 144 applied. The application of this article seems to us to present great difficulties to some of which we like to refer. That article deals with a suit for possession of immovable property or any interest therein not otherwise specially provided for and prescribes a period of twelve years commencing from the date when the possession of the defendant becomes adverse to the plaintiff. This article obviously contemplates a suit for possession of property where the defendant might be in adverse possession of it as against the plaintiff. Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. ***His right to possession "would date from the period when a specific allotment was made in his favour*** : Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh, 1954 SCR 177 at p. 188 (AIR 1953 SC 487 at p. 491). It would, therefore, appear that Sivayva was not entitled to possession till a partition had been made. That being so, it is arguable that the defendants in the suit could never have been in adverse possession of the properties as against him as possession could be adverse against a person only when he was entitled to possession. Support for this view may be found in some of the observations in the Madras Full Bench case of Vyapuri v. Sonamma Boi Ammani, ILR 39 Mad 811 (AIR 1916 Mad 990 (2) FB)".

Justice V. Ramaswami expressing a concurring but a separate opinion held, as under :-

"In my opinion, a suit like the present one will fall within Art. 144 of the Limitation Act. It is true that an alienee of an undivided interest interest of a Hindu coparcener is

entitled to joint possession with the other coparcener and he is also not entitled to separate possession of any part of the family property. But the alienee is entitled to obtain possession of that part of the family property which might fall to the share of his alienor at a partition. What the alinee acquires by a purchase is not any interest in specific family property but only an equity to enforce his right in a suit of partition and have the property alienated set apart for the alienor's share, if possible. In the present case the alienee has instituted a suit for general partition with the prayer that he may be put in possession of that part of the family property which may be allotted to his alienor. It is not right to consider such a suit as a suit for mere partition. The main relief sought by the plaintiff is the relief for possession of that part of the property which may be allotted to the alienor's share and a relief for partition is only a machinery for working out his right ancillary to the main relief for possession of the property allotted to the alienor's share. What the plaintiff seeks is actual delivery of possession. In my opinion, such a suit falls within the purview of Article 144 of the Limitation Act and the law on this point is correctly stated in Thani Vs. Dakshinamurthy, ILR (1955) Mad. 1278 (AIR 1955 Mad 288).

If Article 144 is the proper article applicable, when does time commence to run? According to the third column of Article 144, time begins to run from the date when the possession of the defendant becomes adverse to the plaintiff. As I have already pointed out the possession of the non-alienating members of the family cannot be deemed to be possession on behalf of the alienee also, because the purchaser-alienee does not acquire any interest in the property sold and does not become tenant-in-common with the members of the family nor is he entitled to joint possession with them. It is clear that in the absence of a clear acknowledgment of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of the non-alienating coparceners would b adverse to the alienee, from the date on which he became entitled to sue for general partition and possession of his alienor's share. The fact that the alienee has purchased an undivided interest of joint family property is not inconsistent with the conception of adverse possession of that interest".

12. The aforesaid judgment, however, did not consider the effect of Article 138 as pointed out by learned counsel for the appellants-defendants and which, according to him, would more appropriately govern the present case.

13. Learned counsel for the appellants-defendants then relied upon the judgment of Madras High Court in **Boologam Naidu Vs. Jagannath and Others AIR 1955 Madras 202**, wherein the Madras High Court held, as under :-

> "A Court auction purchaser of an undivided interest of a coparcener in a joint Hindu family cannot be inducted into joint possession with erstwhile coparcener whose rights have been sold and purchased by him. A suit for partition and possession by such a purchaser is governed by Art. 138 and not by Art. 120 or Art. 127 or Art. 137 or Art. 137 and therefore a suit brought within twelve years from the date when the sale became absolute would be within time".

14. Mr. R.K. Agarwal, learned counsel for the appellants-defendants while explaining the public policy behind the law of limitation, drew the attention of the Court towards a recent decision of the Hon'ble Supreme Court in **Popat and Kotecha Property Vs. State Bank of India Staff Association (2005) 7 SCC 510** wherein

the Hon'ble Supreme Court in Paras 7, 8 and 9 of the said judgment held, as under:-

> "7. The period of limitation is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. The statute i.e. the Limitation Act is founded on the most salutary principle of general and public policy and incorporates a principle of great benefit to the community. It has, with great propriety, been termed a statute of repose, peace and justice. The statute discourages litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have not from lapse of time become inexplicable. It has been said by John Voet, with singular felicity, that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal. (Also see France B. Martins Vs. Mafalda Maria Teresa Rodrigues).
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> 8. Bar of limitation does not obstruct the execution. It bars the remedy. (See V. Subha Rao Vs. Secy. to Govt. Panchayat Raj and Rural Development, Govt. of A.P.).
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> 9. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So, a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest *reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). The idea is that every legal remedy must be kept alive for legislatively fixed period of time. (See N. Balakrishnan Vs.

M. Krishnamurthy)".

15. In last, on permissibility to the respondents-plaintiffs to challenge the findings of the learned trial Court on issue No.3 as to relationship of landlord and tenant, learned counsel for the appellants-defendants relying upon the judgment of the Hon'ble Supreme Court in **Choudhary Sahu (Dead) by LRS. Vs. State of Bihar (1982) 1 SCC 232,** urged that in the absence of any cross-objection by the respondent-plaintiff, the appellate court would not be justified in reversing the finding given in favour of the appellants-defendants on issue No.3. He, therefore, submitted that if the relationship of the tenant and landlord was not established between the defendants and the plaintiffs, even if, the decree of the partition is upheld in favour of the plaintiff, he would not be entitled to the possession of the said one-half share of the suit property as the suit itself is barred by limitation in the present case. He further submitted that since the respondents-plaintiffs have not filed any cross-appeal or cross-objection on issue No.3 before this Court, the provisions of Order 41 Rule 22 C.P.C. do not permit the respondents to challenge the said findings in any manner. Thus, he submitted that the present suit deserves to be dismissed as barred by limitation and the appeal of the defendants on this issue was liable to succeed.

16. *Per Contra*, Mr. Ajeet Bhandari, learned counsel appearing for the respondents-plaintiffs, submits that the entire argument of learned counsel for the appellants-defendants proceeded on a misconception. He submitted that since the main relief claimed in the suit was partition of the joint family property for which admittedly and undoubtedly no limitation was prescribed either under the old Limitation Act, 1908 or in the new Limitation Act, 1963, the suit could not be held to be time barred and the learned trial Court had rightly decided the issue of limitation in favour of the plaintiffs. He submitted that there was no question of seeking possession of the joint family property as such because after the court auction, sale in favour of plaintiff Khajulal became the final on 30.11.1942 and on 17.11.1943 the Bailiff of the Court has already delivered the possession of the undivided half share of the suit property and even if, it was a symbolic possession, the possession had already been given to the plaintiff Khajulal.

Again drawing the attention of the Court towards the report of the Bailiff, which is already countersigned by the judgment-debtor Gulab Chand quoted above, he submitted that it clearly established that the possession of the one-half share of the suit

property belonging to Gulab Chand, was given to plaintiff Khajulal even though symbolic and the very fact that it was given on rent by declaration by way of drum beating by the judgment-debtor Gulab Chand and a written rent note was also executed on that date, though no such separate rent note ever came on record before the learned trial Court, he submitted that there is no question of applying the limitation of 12 years from the said date i.e. 17.11.1943 or even from the date when the sale became absolute on 30.11.1942. He further submitted that the subsequent rent note executed on 29.4.1958 was also signed by the judgment-debtor Gulab Chand in favour of the sons of the decree-holder Khajulal and, therefore, the intention and agreement between the parties of landlord and tenancy stood clearly established. He submitted that Ex.5 document is not even in dispute, therefore, the learned trial Court clearly fell into error in deciding issue No.3 against the plaintiff that relationship of landlord and tenant was not established merely because the property in question was not partitioned and because the plaintiff did not realize any rent from the defendant. While submitting that he was entitled to challenge the said finding even under Order 41 Rule 22 C.P.C., which after amendment in the year 1976 w.e.f. 1.2.1977 made the filing of the cross-objections optional, he urged that the plaintiff-respondent could challenge the said finding even to support the decree of partition in his favour, which

was granted to the plaintiff by the learned trial Court while deciding issue No.1 in favour of the plaintiff.

17. Mr. Bhandari, learned counsel for the respondents-plaintiffs also relied upon the same decision of the Hon'ble Supreme Court in **Manikayala Rao Vs. Narasimhaswami (supra)** and emphasizing the observations of the Court in Para 5 of the said judgment that “his right to would date from the period when a specific allotment was made in his favour”, he submitted that it is only when specified one-half share is determined and a specific allotment was made in favour of the plaintiff in a suit for partition on such date of decree alone, the period of 12 years for possession can be said to commence because even after the decree of specified share to be allotted to purchaser of coparcener's right in undivided family property, if he allows the defendant to remain in possession, such possession would be adverse to the plaintiff and even if for 12 years, he does not seek a remedy and relief of possession by a suit for possession, such suit for possession can become time barred. He submitted that in the present case, which is admittedly for the partition of the property and the main relief of partition is also claimed in the said suit for which admittedly there is no prescribed period of limitation, the time bar of 12 years cannot be applied in the present case.

18. Learned counsel for the respondents relying on the judgment of Travancore-Cochin High Court in **Lakshmi Amma Kunji Amma V. Narayana Pillai AIR (39) 1952 Travancore-Cochin 96**, urged that Article 138 of Limitation Act, 1908 has no application in the present case as held by the said Court, as under:-

> "Article 138, Limitation Act, has no application to a suit when the auction-purchaser has obtained through Court actual or constructive delivery of the property. The reason is that when an auction-purchaser after obtaining actual or symbolical delivery brings a fresh suit to recover the property from the possession of the judgment-debtor or from one holding the same, under the latter, his suit is 'qua owner' and not 'qua auction-purchaser'.

19. In **Bireswar Banerjee Vs. Sadhiram Atoi AIR (37) 1950 Assam 50** wherein the Hon'ble Assam High Court held that Article 144 would apply to auction-purchaser's suit property for possession and Article 138 has no application in such cases. The relevant extract of the said judgment is as under:-

> "Symbolical possession, if given, even when actual possession should have been given under the law will interrupt the running of time and give a fresh start of limitation as against the judgment-debtor and his representative. The same principle will apply to the case of a defaulting proprietor whose land is sold for recovery of land revenue. The auction-purchaser will be in a position to sue for possession on the basis of his title by purchase within 12 years of the delivery of possession to him if the defaulting proprietor remains in adverse possession.

Section 16 and Art. 138 do not apply to such a case. Both these provisions apply to the case of a purchaser at a sale in execution of a decree. They do not apply to the case of a plaintiff who has obtained possession, even though symbolical, in execution of his decree. The suit by the purchaser would be an ordinary suit for possession by the owner of the property whose title had become complete and effective by the confirmation of sale and delivery of symbolical possession. The proper article to apply to such a case would be Art. 144".

20. Thereafter referring to the judgment of this Court in **Dropdi Devi Vs. Jagdish Chandra (AIR) 1989 Rajasthan 110** wherein this Court held as under :-

"It need not be stressed that every purchaser of the whole or any portion of the joint family property by a sale in execution of a decree has a right to claim a partition of the joint family property. A person, who is entitled to demand partition may sue to enforce partition. Defendant Kanhaiya Lal, therefore, had a right to claim partition and on his death, the same right can be effectively asserted, claimed or exercised by his heirs and descendants. Whether the alienee is entitled to the specific share purchased by him in the sale conducted by a Court in execution of a money decree is a question to be decided in that partition suit. So long that suit for partition has not been filed, the purchaser is entitled to retain possession over that specific portion purchased by him in the Court auction.

The appeal is, therefore, partly allowed only to this extent that a further direction be added to the decree passed by the courts below to the effect that the execution of the decree in so far as it directs the purchaser to deliver possession of the property to the plaintiffs be stayed for a period of six months and if before the expiry of that period the purchaser brings a suit for general partition, then the stay should continue until the disposal of the suit but if no such suit is brought within that period, then the stay of

execution will stand cancelled".

21. Mulla, the author of "Principles of Hindu Law" (Fifteenth Edition) while discussing Article 261 has pointed out the rights of purchaser of coparcener's interest in the following manner. It would be worthwhile to quote as under :-

> "261. **Rights of purchaser of coparcener's interest** – According to the Mittakshara law as applied in Bombay, Madras, Madhya Pradesh and some other State, a coparcener may alienate his undivided interest in the entire joint family property, or his undivided interest in a specific property forming part of the joint family properties. But he has no right to alienate, as *his interest* any specific property belonging to the coparcenary, for no coparcener can before partition claim any such property as his own; if he does alienate, the alienation is valid to the extent only of his own interest in the alienated property. According to the Mitakshara law as it prevails in West Bengal, Uttar Pradesh and some other States no coparcener can alienate even his own undivided interest in the coparcenary property without the consent of the other coparceners. If he does so, the alienation is not valid even to the extent of his own interest in the property. But Mitakshara law as administered in all the States allows the sale of the undivided interest of a coparcener *in execution of a decree* him. The present section deals with the rights of the purchaser of a specific property, or of a coparcener's interest in the specific property, as to possession and partition, whether the property has been sold by private treaty or in execution. Almost all the cases dealt with in this section relate to the sale of a specific property or the sale of the undivided interest of a coparcener in a specific property. The principles laid down in those cases apply *mutatis mutandis* to the case of a sale of the undivided interest of a coparcener in all the joint family properties".

22. Regarding the limitation, the same author observed on Page 353, as under :-

> "Limitation – There is no article of the Limitation Act which specifically provides for a suit by an alienee from coparcener for general partition or for working out his equities in such suit. A suit for recovery of possession of immovable property by way of substitution by an alienee or transferee for consideration from a coparcener falls under Article 144 of the old Indian Limitation Act, 1908. Now see Art. 65 of Limitation Act, 1963. Reference may also be made to the undermentioned case".

23. On the point of relationship of tenant and landlord between the decree-holder Khajulal and the judgment-debtor Gulab Chand, Mr. Bhandari submitted that no particular form of words is necessary to constitute an instrument or lease and the payment of rent is a usual though not an essential incident of tenancy (**Bakshi Ram Vs. Buta Sigh (AIR) 1957 Punjab 57**). He further submitted that non-payment of rent by itself raises no presumption of adverse possession or lead to the inference that it would amount to repudiation of the landlord's title. Non-payment of rent may be due to several reasons, as for example, the such inability of the tenant to pay rent or smallness of the amount of rent which the landlord does not bother to collect (**Ram Nah Vs. Neta (AIR) 1962 Allahabad 604**). A tenant cannot affect the tile of his landlord merely by non-payment of rent or

discontinuance of payment of rent or by paying, without the knowledge of the landlord, rents to a third person. There is no such a case no ouster of the landlord and limitation does not run against him (**Pravinbhai Uttamrao Reshamwala Vs. Nalinikant Kishandas Bania (AIR) 1961 Madhya Pradesh 93**). He also referred to Privy Council decision in the case of **Jagdeo Narain Singh Vs. Baldeo Singh (AIR) 1922 Privy Council 272** wherein the Privy Council held that if the thikadar fails to collect the rent from any individual tenant it would not create adverse possession against the proprietor. Mere non-payment of rent or discontinuance of payment of rent, has not, by itself been held to create adverse possession. Thus, Mr. Bhandari submitted that the decree of partition in favour of the respondents-plaintiffs deserves to be sustained and the suit could not be held to be barred by limitation as contended by learned counsel for the appellants-defendants. He further submitted that the plaintiff-respondent was also entitled to get the relief of possession as the same was denied by the learned trial Court on an erroneous ground that the relationship of landlord and tenant was not established between the decree-holder and the judgment-debtor in the face of Ex.4 and Ex.5.

24. Mr. Bhandari, learned counsel for the respondents-plaintiffs

also relied upon the judgment of **Hirendra Nath Poddar Vs. Shibendra Nath Poddar (AIR) 1979 Calcutta 135** in which the Hon'ble Calcutta High Court held as under :-

> "Tenancy in respect of an undivided share can be created by a co-sharer in favour of another co-share. A suit for partition would be maintainable although the property which is the subject-matter of partition is in possession of a tenant who happens to be a co-sharer. In such a case it may not be possible for the Court to put the plaintiff into physical possession of the property after the final decree for partition has been made and the plaintiff may have to content himself with a decree entitling him to symbolical possession. Although the disputed property may be demarcated by metes and bounds in respect of the shares of the plaintiff and the defendant, the plaintiff will not be entitled to physical possession of demarcated portion that may be allotted to him under the final decree, so long as the tenancy of the defendant under the plaintiff continues".

25. I have given my anxious consideration to the entire discussion of the case laws above and to the facts and circumstances of the present case.

26. While it is not in dispute that the respondent-plaintiff had filed the present suit on 10.9.1973 mainly claiming the relief of partition as the plaintiff Khajulal had purchased the coparcener's (Gulab Chand) one-half share in the joint Hindu Undivided Family and there is no period of limitation for filing the suit of partition, merely

because the consequential relief of the possession is also claimed by the plaintiff in the same suit, in the opinion of this Court the entire composite suit for the two reliefs of partition and possession, cannot be thrown out on the ground of limitation which would apply only for the suit for possession. It is not in dispute that the purchaser or alienee of a coparcener's undivided share has a right to claim partition because immediately on the purchase of the such share, he does not become the joint owner or co-sharer of that property, therefore, his right to the said property would depend only upon the partition of such undivided property and upon such partition and a specified share being allotted to the such alienee or purchaser in a court auction or by a private negotiation, such alienee becomes entitled to claim possession of such specified partition of the property. The period of limitation of 12 years would apply only to a suit for possession. The words “like suit” employed in Article 138 of the Limitation Act, 1908 have to be read with the words “for possession of immovable property sold” employed in Article 136 preceeding Articles 137 and 138 in the said Limitation Act of 1908. Therefore, assuming for argument sake as contended by learned counsel for the appellant-defendant that Article 138 would apply in the present case, the date of commencement of running of such limitation of 12 years is the date only when a decree of partition is made in favour of the plaintiff, the purchaser of the

undivided share of coparcener in a joint family property.

This proposition can be viewed from other angle also. The Column No.3 of the Article 138 in the Limitation Act, 1908 stipulates “the date when the sale becomes absolute”, the sale of an undivided share of coparcener in a court auction would become absolute only when such share is defined and determined by a decree of partition. The sale in the present case did not become absolute in the true sense of word on 30.11.1942, when the sale certificate was issued by the Court in favour of Khajulal, nor did not it become absolute even with the giving of symbolic possession on 17.11.1943. Such sale became absolute only on the date of decree of partition in favour of the plaintiffs, i.e., the date of impugned judgment of the learned trial Court and decree dated 22.12.1980. Had the plaintiff not claimed the possession in the present suit, he would have got a period of 12 years of limitation from the said date, i.e., 22.12.1980, for claiming the possession. This is what the Hon'ble Supreme Court held in Para 5 in **M.V.S. Manikayala Rao Vs. Narasimhaswami** (supra) to repeat the aforesaid quoted portion of Para 5 : “his right to possession would date from the period when a specific allotment was made in his favour”. Therefore, until and unless the share of the undivided joint family property is specified by a decree of partition, which is the only right

available to the purchaser of undivided share of coparcener, there is no question of applying the limitation of 12 years on the basis of sale certificate or the date of symbolic possession.

27. This Court also cannot appreciate the reasoning given by the learned trial Court for deciding issue No.3 against the plaintiff-respondent. In the face of Ex.4, report of Bailiff dated 17.11.1943 giving the symbolic possession to the Khajulal and subsequent specific rent note executed on 24.9.1958, a document duly signed by the judgment-debtor Gulab Chand and his son Motichand and the said document having been held proved by the learned trial Court itself, which clearly stipulated that the defendant Gulab Chand and his son Motichand would be tenant of the plaintiff Khajulal and his sons on a monthly rent of Rs.5/-, one fails to understand how the learned trial Court could hold that there was no relationship of tenant and landlord during this period. Merely because there was no evidence of actual rent having been paid to the landlord Khajulal on month to month basis and that the property in question was not partitioned, the relationship of landlord and tenant as evidenced by these two documents, could not be denied. Therefore, this Court is of the view that issue No.3 has wrongly been decided by the learned trial Court and the finding of the same deserves to be reversed. The objection of

the learned counsel for the appellant-defendant that the respondent-plaintiff cannot raise this issue, has also no force because the finding in this regard directly flies in the face of the trial Court while deciding issue No.1 holding the plaintiff entitled to partition of one-half share of the suit property. Therefore, to support the decree in favour of the plaintiff, the plaintiff even without filing any cross-objection or cross-appeal on issue No.3 is entitled to challenge the same before this Court in the present appeal filed by the appellant-defendants to support the decree of the partition. The decision of the Hon'ble Supreme Court in **Choudhary Sahu's** case (supra) supports this proposition. Not only Order 41 Rule 22 C.P.C. permits the plaintiff to support the decree not only on the grounds decided in his favour but also on the grounds decided against him, but further Order 41 Rule 33 C.P.C., the object of which is to avoid contradiction and inconsistent decision in the same suit, this Court has ample power and wide discretion to permit the respondent-plaintiff to challenge such finding, which is ex-facie contrary to the documentary evidence duly proved on record. The issue No.3 is thus wrongly decided by the trial Court. It is now held that there existed a relationship of landlord and tenant between the two during the said period.

28. Therefore, this Court is of the opinion that neither Article

138, nor Article 144 would render the present suit filed by the plaintiff barred by limitation as neither the sale in favour of the plaintiff Khajulal can be said to have become absolute on 30.11.1942 or 17.11.1943, nor because it was a suit for merely claiming possession of the one-half share of joint family property and in view of admitted legal position that there was no prescribed period of limitation for claiming partition on the basis of title in favour of the plaintiff, the purchaser of the undivided share of coparcener Gulab Chand. The issue No.9 is thus rightly decided by the learned trial Court.

29. Consequently, this appeal of appellants-defendants is found to be devoid of merit and the same is dismissed.

30. The plaintiffs-respondents shall be entitled to one-half share of the property as specified in the decree and shall be further entitled to possession of such one-half share, which should be delivered to them within the period of three months. The decree be made accordingly.

31. The appeal is dismissed with no order as to costs.

[**Dr. Vineet Kothari**],**J.**

S.S.
Jr.P.A.